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CHEVRON U.S.A., INC.,
Petitioner,

v.

MARIO ECHAZABAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, THE CALIFORNIA CHAMBER OF COMMERCE, AND THE ASSOCIATION OF WASHINGTON BUSINESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.
Counsel of Record
KATHRYN S. ZECCA
Robbins, Russell, Englert Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4503

MELLANI R. HUGHES
Association of Washington Business
1414 South Cherry Street
P.O. Box 658
Olympia, WA 98507
(360) 943-1600

FRED MAIN
California Chamber of Commerce
1215 K Street, Suite 1400
Sacramento, CA 95814
(916) 444-6670

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of business companies and associations, with an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court by filing *amicus curiae* briefs in cases involving issues of concern to American business.

The California Chamber of Commerce is a voluntary, non-profit, California-wide business association with more than 12,000 members, both individual and corporate, who represent virtually every economic interest in the state. Ninety percent of the California Chamber's members are small or medium-sized businesses that it represents before the Legislature, local governing bodies, and the courts on a broad range of issues affecting business.

The Association of Washington Business ("AWB") has a membership consisting of businesses large and small, urban and rural, and from all parts of the state. AWB is the oldest and most influential business organization in the state, and serves as Washington's chamber of commerce. Of 3,700 members, 75 percent are businesses with fewer than 50 employees. AWB's membership also includes some of the nation's largest and most influential companies. AWB serves as the principal voice of the business community. An important function of AWB is to represent the interests of its members by filing amicus briefs in cases presenting issues of statewide concern to businesses.

Many members of the U.S. Chamber, the California Chamber, and AWB are employers subject to Title I of the

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Counsel for *amici curiae* wrote this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and other employment statutes and regulations. As employers, and as potential respondents to ADA charges, *amici*'s members have a direct interest in the Court's determination whether an employer may, consistent with the ADA, refuse to hire an individual with a disability when the individual is unable to perform the essential functions of the job without posing a substantial risk to his own health or safety.

As employers, *amici*'s members are also required to comply with the Occupational Safety and Health Act (the "OSH Act"), 29 U.S.C. § 651 *et seq.*. Under that act, they have a general duty to maintain a work environment free of hazards that may cause death or serious physical harm to their employees. *Amici*'s members therefore also have a substantial interest in the determination whether their duties under the OSH Act must give way to the Ninth Circuit's interpretation of the ADA.

Like many employers, many of *amici*'s members prepare job descriptions specifying the duties associated with a particular job, the skills required to perform the job, and the educational and other job-related requisites for the job. Under the ADA, in determining whether a person is a "qualified" for a particular job, consideration should be given to an employer's written description of a job and to the employer's judgment as to what job functions are essential. 42 U.S.C. § 12111(8). Here, Chevron has prepared a written description of the requirements of the job at its coker unit, a description that "incorporated the need for an employee to be able to tolerate an environment" that included toxins and chemicals (Pet. App. 15a), but the majority opinion rejected that definition in favor of its own belief as to what constituted the essential functions of the job. *Ibid.* *Amici*'s members have a strong interest in understanding the extent of their potential liability under the ADA for adhering to their own pre-existing decisions regarding the requirements for their job positions.

Additionally, many of *amici*'s members employ physicians. Among their duties, which generally involve maintenance of the health and safety of the workforce, these company physicians provide medical advice and guidance as to whether or not a particular individual can perform a particular job. Here, Chevron's doctors (in consultation with respondent's personal physician) concluded that respondent's disability rendered him unable to perform the job he sought without seriously endangering his health. Chevron relied on this advice to withdraw respondent's conditional job offer. *Amici*'s members therefore also have a direct interest in ensuring that they can rely on the professional medical opinion of their physicians in determining whether a job applicant is qualified.

Accordingly, *amici* have both an interest in, and familiarity with, the issues presented to the Court in this case. Because of their significant experience in these matters, *amici* are well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit majority concluded that threat to self is completely irrelevant under the ADA. Petitioner Chevron contends (as did Judge Trott in dissent) that threat to self is relevant to both whether an individual is "qualified" within the meaning of the ADA and the so-called "direct threat defense." The Solicitor General's position, as expressed in his *amicus* brief filed at the Court's invitation, is that petitioner is right about the latter contention but not necessarily the former.

Amici believe that Chevron and Judge Trott are right about both positions. Because the merits briefs of petitioner and the Solicitor General (as well as other *amici* supporting petitioner) will fully address the "direct threat defense" issue, *amici* will not. Rather, this brief demonstrates that threat to self must be taken into account in deciding who is a "qualified individual with a disability." 42 U.S.C. § 12112(a).

I. The ADA prohibits discrimination only against those individuals with a disability who are otherwise qualified to perform the essential functions of the job. 42 U.S.C.

§ 12112(a). An individual whose performance of essential job functions will seriously endanger his own health is not a "qualified" individual with a disability. *Ibid.*

A. Neither the text of the ADA, nor the regulations implementing the ADA, expressly permit or forbid consideration of the health risks to the employee (or others) in determining whether a job applicant is "qualified." The reasonable reading of the statute, however, is that a person who cannot perform a job without posing a substantial risk to his health is not qualified to do that job, especially if the employer's written job description, which *must* receive consideration under the statute (42 U.S.C. § 12111(8)), makes safe performance an essential function of the job.

B. The Rehabilitation Act definition of "qualified" carries over to the ADA. In both the ADA (42 U.S.C. § 12201(a)) and the 1992 amendments to the Rehabilitation Act (29 U.S.C. §§ 791(g), 794(d)), Congress explicitly stated that the same standards are to be applied under the two Acts. As Judge Lynch's opinion for a unanimous panel of the First Circuit concluded in *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997), so construing the statutes compels the conclusion that a substantial health risk resulting from an individual's performance of a job renders that individual not "qualified" under the ADA.

The regulations under the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, explicitly address this issue. They provide that a "qualified individual" is one who "can perform the essential functions of the position in question *without endangering the health and safety of the individual* or others * * *." 29 C.F.R. § 1614.203(a)(6) (emphasis added). The regulation is consistent with EEOC adjudications under the Rehabilitation Act, as well as case law under the Rehabilitation Act. The Rehabilitation Act regulation should be followed, and the plaintiff should bear the burden of proving that he or she can perform the job safely as part of the showing that the plaintiff is a "qualified individual with a disability."

C. The Rehabilitation Act regulation is entitled to deference. This Court so held in *Bragdon* v. *Abbott*, 524 U.S. 624, 638-39 (1998), relying on the Rehabilitation Act's definition of "handicapped individual" to interpret the term "disability" under the ADA. The regulation deserves substantially more deference than the EEOC's litigating position with regard to the ADA: the EEOC argues that the health of the individual is limited to the applicability of the "direct threat defense," and has no relevance to the determination whether the individual is qualified. The First Circuit properly rejected that position in *Amego* and instead relied on the Rehabilitation Act regulation. 110 F.3d at 142, 144.

II. Even without regard to Rehabilitation Act regulations, the only appropriate construction of the term "qualified" is one that takes into account the risk to an employee's health.

A. The ADA should be read as part of the total corpus of federal employment law. An integral part of this body of legislation is the OSH Act, which requires the protection of employee health and safety and the prevention of employee injury. The OSH Act's policies and mandates (it should go without saying) apply to the employment of disabled persons. An individual is not "qualified" for employment, then, if his employment would vitiate the goals of the OSH Act. Time and again, this Court has instructed the lower federal courts to read the entire United States Code as a harmonious whole. Even in the absence of a specific OSH Act regulation governing respondent's precise situation, a construction of the ADA that needlessly creates the very kind of danger to employees that the OSH Act seeks to avoid creates a sharp tension in federal law. That tension can and should be avoided by construing the ADA to take account of whether a particular position would endanger an employee as part of the inquiry whether he or she is "qualified" for the position. Furthermore, there *is* an OSH Act regulation that would permit respondent, if hired, to refuse to perform his job on the ground that it would endanger him, and would protect him from retaliation. 29 C.F.R. § 1977.12(b)(2). There

is no reason why the ADA should be construed to command petitioner to hire respondent for a job he could then lawfully refuse to perform.

B. Contrary to the majority opinion below (Pet. App. 9a-10a), such a construction of the statute is not "paternalistic" in any legally consequential sense. Reference to Title VII precedents to arrive at such a conclusion is inappropriate, given that issues involving an employee's health and safety are better resolved by reference to the federal statute — the OSH Act — that addresses this very issue. The OSH Act itself is "paternalistic" in a sense, but the function of a court construing the intent of Congress is to distinguish those respects in which Congress *wished* to act paternalistically from those in which it did not. It takes little imagination to realize that Congress wished to protect employees from workplace hazards.

C. It is possible to construe the requirement that the employee be "qualified" and the availability of a "direct threat" defense to the employer so that each takes account of the threat the employee might pose to himself or herself, yet they are not redundant. The "not onerous" burden generally imposed on employment discrimination plaintiffs, for example, could be applied to the threshold inquiry, with a more searching inquiry applied at the defense stage. The more persuasive analysis, however, recognizes that it simply does not matter if the two provisions are redundant. The ADA, undeniably, is filled with such redundancies. The presumption that Congress does not write redundant provisions – powerful but not irrebuttable in most cases, and demonstrably fictional in this case – should not be allowed to overcome the strong indications that Congress did wish safety to be taken into account at the stage of determining whether the plaintiff is a "qualified individual."

ARGUMENT

I. AN INDIVIDUAL WHO WILL SERIOUSLY ENDANGER HIS OWN HEALTH BY PERFORMING ESSENTIAL JOB FUNCTIONS IS NOT A "QUALIFIED INDIVIDUAL WITH A DISABILITY"

The Ninth Circuit concluded that being "qualified" for a job must mean only being able to perform its physical tasks. But nothing in the ADA's definition of "qualified individual with a disability" compelled that conclusion, and other sections of the ADA, which the Ninth Circuit had no warrant to disregard, suggest that it was perfectly proper for petitioner to define the qualifications for respondent's job more broadly. Rehabilitation Act regulations, which should apply with equal force to ADA cases, also make it clear that being "qualified" includes not endangering one's own health or safety or that of others. The Ninth Circuit likewise had no warrant to disregard those regulations. Indeed, under *Bragdon* v. *Abbott*, they were entitled to some level of deference. Because neither the ADA's text and structure nor any ADA regulation contradicts those Rehabilitation Act regulations, they should be dispositive.

A. To Be Qualified For A Job Entails More Than Being Able To Perform Its Physical Tasks

The ADA prohibits discrimination against any "qualified individual with a disability." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is "[a]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Is a person "qualified" – "can" he or she "perform the essential functions" of a job – if doing so will result in serious injury or death to that person? As a purely linguistic matter, without resort to any of the other sources that inform statutory interpretation, the section surely could be read either way. "I can't

do *X* because I would hurt myself if I did," and "I can do *X*, but I would hurt myself if I did," are equally natural English usages.

The EEOC regulations interpreting the ADA state simply that "[q]ualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). The regulation is no less ambiguous than the statutory language itself.

Other sections of the ADA, however, do shed significant light on the issue. The ADA requires that courts give consideration to an employer's judgment as to what is required to perform the job in question. 42 U.S.C. § 12111(8) ("consideration shall be given to the employer's judgment as to what functions of the job are essential"); see also 29 C.F.R. § 1630.2(n)(3) ("[e]vidence of whether a particular function is essential includes * * * (ii) [w]ritten job descriptions prepared before advertising or interviewing applicants for the job"). And under the Rehabilitation Act this Court has accorded deference to the decisions of federal agencies regarding the criteria that must be met for a plaintiff to be considered "qualified." See *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979) (deferring to Department of Health, Education, and Welfare regulation defining a "qualified handicapped person" with regard to education services). As the First Circuit has stated, "[w]here the plaintiff has presented no evidence of discriminatory intent, animus, or even pretext, we think there should be special sensitivity to the danger of the court becoming a super-employment committee." *EEOC* v. *Amego, Inc.*, 110 F.3d at 145.

Chevron prepared a written description of the job for which respondent applied (as well as every other position at the refinery). Pet. App. 36a-37a. The descriptions listed not only the tasks involved in performing the job, but also the specific

chemicals, solvents, and liquids to which an employee would be exposed. *Ibid.* The job description, therefore, made clear that the employee must "*be able to tolerate* an environment including, among other things, hydrocarbon liquids and vapors, petroleum, solvents and oils." Pet. App. 15a (emphasis added). The doctors who evaluated respondent's condition relied on that job description in determining that performance of the job would endanger respondent's health. Pet. App. 36a-39a.

Nonetheless, the majority below discarded Chevron's description, substituting its own definition of essential job functions. Judge Reinhardt's opinion for the majority held that those functions comprised only the physical aspects of the job and that respondent was capable of performing those functions. Pet. App. 15a-16a. In reaching that conclusion, the majority simply gave no weight to the consideration that respondent's performance of those tasks would seriously endanger respondent's health, and possibly cause him to die.[2] Substituting epithet for analysis, the majority described that concern as "a paternalistic risk-to-self defense in circumstances in which an employee's disability does not prevent him from performing the requisite work." *Id.* at 16a.

The majority's reasoning is absurd. Certainly, if exposure to toxins in the workplace would cause respondent to pass out or suffer seizures while at work, all would agree that respondent is unable to perform the essential functions of the job. But, because exposure to those toxins does not prevent respondent from surviving the workday, and, instead will "only" seri-

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[2] We assume for purposes of this *amicus* brief, as did the panel majority below for purposes of its decision, that the threat to respondent's health is severe. Although respondent has disputed that proposition in his brief in opposition in this Court, petitioner and perhaps other *amici* will address that issue; we will not address it in this brief. For reasons stated in the *amicus* brief the U.S. Chamber joined in the Ninth Circuit, the U.S. Chamber disagrees with respondent's position on that issue.

ously injure him at a later date, under the majority's view, respondent can do the job. The better view is aptly stated in Judge Trott's dissent: "[T]he job most probably will endanger his life. I do not understand how we can claim he can perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him." *Id.* at 21a.

The dubious logic of the majority below was appropriately rejected by the Seventh Circuit in *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599 (7th Cir. 1999). In that case, the medical testimony established that, although the plaintiff could currently perform the tasks associated with his job as a cupola operator, plaintiff's degenerative wrist disease would eventually cause him to "wear out" and no longer be able to perform heavy labor. *Id.* at 601. The Seventh Circuit concluded that the plaintiff was not qualified: "[Plaintiff] may have shown that he wanted to return to work despite the risk of pain and harm, but that is not the test. He had to show that he was qualified to do the job." *Id.* at 603.

The Seventh Circuit's reasoning is correct, especially as applied to a case in which the employer included tolerance to specific chemicals in its written job description. It certainly does not contradict the *language* of the ADA to conclude that being "qualified" for a position entails more than the ability to perform the physical tasks associated with that position.

B. Under The EEOC Regulations Implementing the Rehabilitation Act, Which Apply With Equal Force to the ADA, Respondent Is Not Qualified

1. Section 504 of the Rehabilitation Act and the ADA both prohibit discrimination against qualified individuals with a disability. Compare 29 U.S.C. § 794(a) ("[n]o otherwise qualified individual with a disability * * * shall * * * be subjected to discrimination") with 42 U.S.C. § 12112(a) ("[n]o covered entity shall discriminate against a qualified individual with a disability * * *").

The definition of "qualified individual" under the Rehabilitation Act regulations applies with equal force to the ADA. Congress has expressly stated that the ADA and the Rehabilitation Act are to be read together. In enacting the ADA, Congress provided that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). The ADA's legislative history states more specifically that the definition of "qualified individual with a disability" "is comparable to the definition used in regulations implementing section 501 and section 504 of the Rehabilitation Act of 1973." H.R. Rep. No. 101-485 (II), *55 (May 15, 1990), *reprinted in* 1990 U.S.C.C.A.N. 303.

In the 1992 amendments to the Rehabilitation Act, Congress reaffirmed that the standards under the two statutes are the same, mandating that the standards to be used in determining whether the Act has been violated "shall be the standards applied in title I of the Americans with Disabilities Act." 29 U.S.C. §§ 791(g) (employment by federal entities), 794(d) (employment by programs or activities receiving federal assistance).

In a case in which an explicit command of the ADA contradicted prior interpretations of the Rehabilitation Act, and perhaps even in a case in which an ADA regulation entitled to *Chevron* deference contradicted prior interpretations of the Rehabilitation Act, these statutory provisions would likely require that the Rehabilitation Act interpretation be conformed to the ADA, not the other way around. In a case in which the Rehabilitation Act provides a *definitive* answer, however, and the ADA's language and regulations do *nothing* to contradict that answer, surely there is no warrant for a court to depart from settled interpretation of the Rehabilitation Act. Rather, Congress's intent that the two statutes be interpreted identically leads logically to the conclusion that settled Rehabilitation Act precedents and regulations should be applied to cases under the

ADA except in cases of palpable conflict. And in fact the Court has done just that. See *Bragdon* v. *Abbott*, 524 U.S. at 631, 638-639, 645.

2. Although the EEOC regulations under the ADA defining "qualified individual with a disability" do not explicitly address the impact of a threat to an individual's health, the regulations implementing the Rehabilitation Act speak directly to the issue: "Qualified individual with handicaps means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question *without endangering the health and safety of the individual* or others * * *." 29 C.F.R. § 1614.203(a)(6) (emphasis added). In other words, under the Rehabilitation Act, if an individual will endanger his or her own health or safety in the course of performing the essential functions of a job, the individual is not qualified.

The EEOC has adhered to this definition of "qualified individual" in its adjudications. In *Burkey* v. *Reno*, 1996 WL 28646 (E.E.O.C. Jan. 19, 1996), the EEOC determined that the Rehabilitation Act did not prohibit the removal of a correctional officer from her position on the ground that her disability — severe, chronic asthma — placed her at a substantial risk of contracting tuberculosis or and other infectious diseases.

Cases interpreting the Rehabilitation Act uniformly use the same definition of "qualified individual." In *Knapp* v. *Northwestern University*, 101 F.3d 473 (7th Cir. 1996), for example, the Seventh Circuit held that a college student was not "qualified" to play intercollegiate basketball because the student's heart condition made it probable that he would suffer a fatal heart attack if he played on the defendant university's basketball team. *Id.* at 482-483; see also *id.* at 483 ("A significant risk of personal physical injury can disqualify a person from a position if the risk cannot be eliminated."). Similarly, in *Chiari* v. *City of League City*, 920 F.2d 311, 317 (5th Cir. 1991), the Fifth Circuit concluded that a construction inspector

was not qualified for his position because the effects of Parkinson's disease posed a risk that he would injure himself.

Courts that considered the issue before the enactment of the ADA are in accord. See *Mantolete* v. *Bolger*, 767 F.2d 1416, 1422-24 (9th Cir. 1985) (job applicant would not be qualified if she were unable to perform the essential functions of the job without a probability of substantial injury to herself); *Doe* v. *New York University*, 666 F.2d 761, 777 (2d Cir. 1981) (applicant for admission to medical school would not be qualified if there were a "risk that her mental disturbances will recur, resulting in behavior harmful to herself and others"); *Milkucki* v. *United States Postal Service*, 1986 WL 10516, *7 (D. Mass. Sept. 22, 1986) (applicant for a position as a mail handler would not be qualified if there were a reasonable probability that her scoliosis would cause her substantial harm); *E.E. Black, Ltd.* v. *Marshall*, 497 F. Supp. 1088, 1103 n.16 (D. Haw. 1980) (recognizing that in some instances the risk of injury to an employee renders the employee not qualified for a particular job).

3. Both at the time the ADA was enacted, and currently, the Rehabilitation Act regulations' definition of "qualified individual" has provided that an individual is not qualified if he cannot perform the essential functions of the job without endangering himself.[3] And numerous courts had stated, before the ADA was enacted, that an individual whose handicap posed a risk that the person would seriously injure himself while performing the functions of a job was not qualified for that job. See *Doe*, 666 F.2d at 777; *Milkucki*, 1986 WL 10516, at *7; *E.E. Black, Ltd.*, 497 F. Supp. at 1103 n.16. "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon*, 524 U.S. at 631.

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[3] The regulation was originally codified at 29 C.F.R. § 1614.702. See 43 Fed. Reg. 12295 (Mar. 24, 1978). This provision was redesignated as 29 C.F.R. § 1614.203 in 1992. See 57 Fed. Reg. 12634 (Apr. 10, 1992).

Accordingly, when Congress stated that the ADA was to be read in conjunction with the Rehabilitation Act, Congress intended that the EEOC's (and the courts') interpretation of the Rehabilitation Act apply to the ADA. See *Amego*, 110 F.3d at 144 (in a case brought under the ADA, acknowledging that EEOC regulations under the ADA defining "qualified individual" do not address risk posed to others, and relying on Rehabilitation Act regulations to take that factor into account in determining whether the plaintiff was qualified).

The Ninth Circuit's opinion, however, simply ignores the congressional mandate that the ADA be read in conjunction with the Rehabilitation Act. The majority conceded that, under the Rehabilitation Act regulations, a disabled person is not "qualified" if his disability poses a reasonable possibility of substantial harm to him. Pet. App. 16a-17a n.10 (citing *Mantolete*, 1422-24). Nonetheless, the majority asserted that the "Rehabilitation Act regulation [] is irrelevant to our inquiry" (*ibid.*) because, according to the majority, the ADA's definition of "qualified individual" speaks directly to the issue. As petitioner will explain in its merits brief and as the Solicitor General convincingly showed in his petition-stage *amicus* brief (at 12-13), only the most blatant misuse of the *expressio unius* principle could lead to the conclusion that the ADA reflects an explicit congressional intent to require that threats to oneself be disregarded.[4] See also *Chickasaw Nation* v. *United States*, 122

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[4] *Amici* agree with the Solicitor General to the extent that he shows that the decision below is indefensible and that threat to self must be taken into account *at least* as a defense available to the employer. But *amici* disagree, for the reasons stated in this brief, with the Solicitor General to the extent that he asserts that the EEOC's regulations under the ADA "appropriately place the burden of proof on employers" because they "analyz[e] employer concerns about threat to self as a defense (rather than part of the employee's prima facie demonstration that he or she is 'qualified' under 42 U.S.C. 12112(a))." U.S. Br. 16 (Sept. 26, 2001). Just as is true under the Rehabilitation Act, threat to self should be considered as part of *both* the showing the employee must make that he or she is "qualified" *and* the employer's defenses.

S. Ct. 528, 532 (2001) (explaining that "to 'include'" something in a statute is *not* necessarily to exclude everything else given the ordinary meaning of the word). In the absence of any reliable indication in the text of the ADA, or even its implementing regulations, that threats to oneself are to be disregarded, the Rehabilitation Act regulations should be controlling.

4. As is the case in every action brought under the Rehabilitation Act, the plaintiff bears the burden of establishing that he is "qualified" for the job in question, including that he will not endanger the health of himself or others. See *Amego*, 110 F.3d at 142 ("It is generally accepted that * * * the plaintiff bears the burden of showing she is a 'qualified' individual.") (quoting *Jacques* v. *Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996)). In *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), a case brought under the Rehabilitation Act, the Court considered whether it was appropriate to dismiss a school teacher who was susceptible to tuberculosis on the ground that the contagious disease could endanger the health of others. Remanding the case to the trial court, the Court held that it was appropriate to consider, as part of whether the plaintiff was "*otherwise qualified*," the potential of harm to third parties. *Id.* at 287-88 (emphasis added). In other words, the Court indicated that the question whether a plaintiff would endanger the health of others (the issue of endangering one's own health was not at issue in that case) was part of plaintiff's *prima facie* burden, not part of the employer's "direct threat" defense. See also *Albertsons, Inc.* v. *Kirkingburg*, 527 U.S. 555, 578 (1999) (Thomas, J., concurring) ("Presumably, then, a plaintiff claiming a cause of action under the ADA bears the burden of proving, *inter alia*, that he is a qualified individual.").

Specifically, in numerous cases in which the risk to an employee's own health was at issue, the courts have confirmed that it is the plaintiff's burden to establish that he is "qualified." For example, in *Amego*, the First Circuit held that summary

judgment for the employer was appropriate because plaintiff "did not meet her burden of demonstrating that she is qualified." 110 F.3d at 144. And in *Chiari*, the Fifth Circuit stated that "[t]o qualify for relief under this statute [the Rehabilitation Act], Chiari must prove that * * * he is 'otherwise qualified' to be a construction inspector." 920 F.2d at 315. Other circuits are in accord. See *D'Amico* v *City of New York*, 132 F.3d 145, 149 (2d Cir. 1998) ("The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that he is qualified for the position despite his disability."); *Knapp*, 101 F.3d at 478 ("[t]o prevail on his claim for discrimination under the [Rehabilitation] Act, Knapp must prove that * * * he is otherwise qualified for the position sought"); *Mantolete*, 767 F.2d at 1423 ("the plaintiff bears the burden in the first instance of showing she is qualified to perform the essential functions of the job") (citing *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981)).

It is certainly true that, in many cases, it may be the employer who first articulates the reason why an employee may not be qualified for a position. See, *e.g.*, *Amego*, 110 F.3d at 141 (employer argued that plaintiff was not qualified because of diagnosed depression), *Chiari*, 920 F.2d at 315-16 (defendant justified not hiring plaintiff because performance of job would endanger his safety). Nonetheless, whichever party first raises the issue, it remains the plaintiff's burden under the Rehabilitation Act to prove that he is can perform the essential functions of the job without endangering the health or safety of himself or others.

C. The Rehabilitation Act Regulations Are Entitled to Deference

1. In *Bragdon* v. *Abbott*, 524 U.S. at 638-639, this Court relied on the Rehabilitation Act regulations to determine what is and is not a "major life activity" under the ADA. See 42 U.S.C. § 12102(2)(A) (defining a disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"). In according deference to the Rehabilitation Act regulations, the Court noted (*id.* at 642) that "[r]esponsibility for administering the Rehabilitation Act was not delegated to a single agency, but we need not pause to inquire whether this causes us to withhold deference to agency interpretations under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984)." Instead, the Court observed, "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Ibid.* (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)). Similarly, here, the regulations defining "qualified individual with handicaps" are entitled to deference.

Not all EEOC pronouncements, however, are entitled to deference. Notably, the EEOC has taken the litigating position in this case and others that the health and safety of an individual are properly considered *only* with regard to the "direct threat defense" (see 29 C.F.R. § 1630.2(r)), and are not relevant to whether an individual is qualified. *E.g.*, *Amego*, 110 F.3d at 142-144. But litigating positions taken by agencies are not accorded the same deference as regulations implemented after notice and comment, as were the Rehabilitation Act regulations on which we rely. See 57 Fed. Reg. 12634 (Apr. 10, 1992). As this Court noted in *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2177 (2001), not all agency pronouncements are entitled to the same level of deference. In particular, an "interpretation advanced for the first time in a litigation brief" receives deference at the lowest end of the spectrum of judicial responses, "near indifference." *Id.* at 2172 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)).

One circuit has expressly rejected the EEOC's litigating position on this issue. In *EEOC* v. *Amego, Inc.*, *supra*, the EEOC argued that the issue of the health or safety of others must be analyzed under the "direct threat" defense, and had no relevance to the resolution of whether plaintiff was qualified for the position in question. 110 F.3d at 142. The First Circuit

disagreed, ultimately concluding that plaintiff was not qualified because she posed a direct threat to others. *Id.* at 144; see also *Albertsons*, 527 U.S. at 578-80 (Thomas, J., concurring) (employee's failure to meet qualification standards establishes that the employee is not qualified for the job).

Accordingly, in order to read the ADA and the Rehabilitation Act together — as Congress intended — the Court must follow either the regulation (and judicial interpretations) under the Rehabilitation Act or the EEOC's litigating position vis-à-vis the ADA. The choice is simple; the regulation that is entitled to deference must trump a litigating position meriting "near indifference."

II. EVEN WITHOUT REGARD TO REHABILITATION ACT REGULATIONS, AN INDIVIDUAL WHOSE HEALTH IS ENDANGERED BY PERFORMING THE JOB IN QUESTION IS NOT QUALIFIED UNDER THE ADA

A. The ADA cannot be read in a vacuum. As we have explained, the ADA and the Rehabilitation Act are to be construed alike. But the Rehabilitation Act is not the only statute to be considered in interpreting the ADA; to the contrary, the ADA should be read in the context of the total body of federal employment law, particularly "longstanding laws mandating workplace safety." Pet. App. 22a.

It is a "familiar principle of statutory construction that, when possible, courts should construe statutes * * * to foster harmony with other statutory and constitutional law." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994); accord *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). "Statutory interpretation requires more than concentration on isolated words; rather, consideration must be given to the total corpus of pertinent law * * *." *Boys Market, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 250 (1970) (harmonizing provision of Norris-LaGuardia Act, 29 U.S.C.

§ 104, and provision of Labor Management Relations Act, 29 U.S.C. § 185(a)).

The core policies underlying the OSH Act are the protection of employee health and safety and the prevention of injury: "The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." 29 U.S.C. § 651(a). The OSH Act's general duty clause therefore imposes a duty on every employer to "furnish to *each* of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1) (emphasis added). "[T]his provision * * * was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary [of Labor]." *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980).

The OSH Act's mandates are not to be simply cast aside when it comes to the employment of disabled persons. The U.S. Department of Labor, the agency charged with administering the OSH Act, has implemented interepretive guidance describing how the OSH Act and the ADA are to work together. OSHA, Standards of Interpretation and Guidance, Employment of Individuals with Disabilities (Aug. 27, 1997), at www.osha-slc.gov/OshDoc/Interp_data/I19970827.html. Significantly, this guidance recognizes that an employer may take into account the risk to the employee associated with the performance of a job: "[I]f an employee can perform their [*sic*] job functions in a manner *which does not pose a safety hazard to themselves* [*sic*] or others, the fact that they [*sic*] have a disability is irrelevant * * *." (Emphasis added.)

What is more, under the OSH Act, respondent could have refused to perform the job at the coker unit on the ground

that performance of the job would endanger his health. The OSH Act regulations provide that:

> [O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.

29 C.F.R. § 1977.12(b)(2).[5] This Court unanimously upheld Section 1977.12(b)(2) in *Whirlpool Corp.* v. *Marshall*, *supra*.

Accordingly, if the decision below is correct, petitioner must hire respondent, *despite* the interplay between his disability and hazardous chemicals, under the ADA, but then respondent could refuse to do the job, *because of* the interplay between his disability and hazardous chemicals, under the OSH Act. This is nonsensical, and the majority erred in producing such an illogical result: "[I]t our role to make sense rather than nonsense out of the *corpus juris*." *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991). See also *ibid.* ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.").

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[5] The result should be the same under the ADA. "[I]f a person is employed as a painter and is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures, the person would be substantially limited in a major life activity, by virtue of the resulting skin disease or seizure disorder. * * * In such a case, a reasonable accommodation to the employee may include assignment to other areas where the particular paint is not used." H.R. Rep. No. 101-485(III), *29 (May 15, 1990), *reprinted in* 1990 U.S.C.C.A.N. 445.

When the ADA is read in conjunction with the OSH Act, then, any possible ambiguity in the ADA's statutory text disappears. An individual cannot be "qualified" for a job if performing its functions would vitiate the very policies underlying the OSH Act. And an individual cannot be qualified for a job under the ADA that he could refuse to accept or to perform under the OSH Act.

For this reason, we disagree with the Solicitor General's suggestion that "Congress has not 'directly spoken to the precise question' whether an employer may require a prospective employee be able to perform the job he seeks without posing a threat to his own health or safety." U.S. Br. 11 (Sept. 26, 2001) (quoting *Chevron*, 467 U.S. at 842). The conclusion that a statute is ambiguous and that *Chevron* deference applies can be reached only *after*, not before, traditional tools of statutory interpretation are applied to determine whether Congress's intent is clear. *Chevron*, 467 U.S. at 843 n.9; see generally Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829 (1990). In this instance, the incompatibility the Ninth Circuit's ruling would create between the ADA and the OSH Act forecloses any conclusion that the ADA is sufficiently ambiguous to permit the Ninth Circuit's interpretation. *Chevron* deference is unnecessary to decide this case.

As it happens, applying *Chevron* deference in this case would also result in reversal of the decision below, because the EEOC regulation directly on point favors petitioner. See U.S. Br. 14-16 (Sept. 26, 2001). And, as we argued in Part I, the relevant EEOC regulation under the Rehabilitation Act *also* favors petitioner, and does so on the precise ground *amici* urge, so that deference would produce what *amici* believe to be the appropriate result here. Because the government or others often urge deference to EEOC pronouncements that *amici* believe to be inconsistent with the proper interpretation of the statute,[6]

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[6] *E.g.*, *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999)

however, it is important that the Court not jump too readily to the conclusion that the ADA is ambiguous and means whatever the EEOC says it means.

B. Because petitioner's refusal to hire respondent is entirely consistent with the policies underlying the OSH Act (policies that are nowhere disavowed in the ADA), the majority was wrong in concluding that petitioner's actions were "paternalistic" in any legally consequential sense (Pet. App. 9a-10a). Certainly, the ADA does not sanction employment decisions based on stereotypical notions regarding whether an individual's condition "'might,' 'could,' or 'would'" affect him if he were to perform the functions of a job. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482 (1999). But the ADA condones precisely the type of "individualized inquiry" (*id.* at 483) undertaken in this case; that is, an analysis of the impact of the particular job applicant's disability on the functions of the specific job in question.

For this reason, the Ninth Circuit's reliance on *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), is misplaced. In *Dothard*, the Court rejected an Alabama regulation setting height and weight restrictions for correctional officers, which had the effect

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(EEOC Interpretive Guidance under the ADA); *EEOC* v. *Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000) (EEOC Interpretive Guidance under the ADA); *National Railroad Passenger Corp.* v. *Morgan*, No. 00-1614 (to be argued Jan. 9, 2002) (EEOC regulations under Title VII). There are grounds other than incompatibility with the statute for rejecting deference in each of the cited cases: in *Sutton* and *Exxon*, Interpretive Guidance rather than a regulation was at issue, and in *Morgan* the regulation for which the respondent seeks deference is inapplicable to the private sector. Nevertheless, in each case either the EEOC or a private party claimed or is claiming that the EEOC's pronouncement should receive *Chevron* deference. *Sutton* is particularly instructive, because the Court assumed for purposes of its decision that full *Chevron* deference might apply, yet still rejected the EEOC's interpretation as incompatible with the ADA, applying tools of statutory construction rather than merely parsing the single section at issue to see whether its bare words were ambiguous.

of discriminating against women, noting that a "refus[al] to hire an individual woman or man" may not be "on the basis of *stereotyped characterizations* of the sexes." 433 U.S. at 333 (emphasis added). That is not a concern here, where "the threat of injury to the [disabled] person is not based on unfounded fears or stereotypes," but instead is "veritable." *Chiari*, 920 F.2d at 317 (employer's judgment that there was a substantial risk that plaintiff would injure himself established that plaintiff was not qualified).[7] And, in *Dothard*, the Court let stand the regulation prohibiting women from working as correctional officers in high-security all-male prisons. In so doing, the Court emphasized that it would be an "oversimplification to characterize [the regulation at issue] as an exercise in romantic paternalism." 433 U.S. at 335. So too, in the case of an employee who poses a substantial risk to his own health, is it an "oversimplification" to describe the employer's decision as "paternalism."[8]

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[7] In *Chiari*, the Fifth Circuit rejected the plaintiff's argument, explicitly based on *Dothard*, that he "should be free to make his own choices regarding his personal safety." 920 F.2d at 316-17. In so doing, the court questioned whether Title VII precedents were relevant to interpreting the Rehabilitation Act. *Id.* at 316 & n.5.

[8] To be sure, all worker-protective legislation, and all worker-protective interpretations of legislation, are "paternalistic" in *some* sense. But, even though "paternalistic" legislation is often controversial, the Court recognized long ago that it does not have a roving commission to strike down all such legislation because it conflicts with the freedom of contract. Compare *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923) (holding minimum-wage law unconstitutional), with *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) (overruling *Adkins*). "Paternalism" comes in many varieties, and the task of a court interpreting a statute is to distinguish the paternalism that Congress approved from the paternalism that Congress condemned, not to use "paternalistic" as an epithet to condemn a result without analyzing it. In the present case, the OSH Act forcefully shows that Congress remains "paternalistically" concerned about protecting workers from workplace hazards, and the ADA does not even remotely suggest that

Nor is the Ninth Circuit majority's reliance on *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), any more persuasive. There, the employer prohibited all women — but not men — of child-bearing age from employment in jobs exposing them to lead, even though that exposure to lead also has a "debilitating effect * * * on the male reproductive system." *Id.* at 198. By treating *similarly situated* men and women differently, the employer's policy ran contrary to the central purpose of Title VII to "prohibit[] sex-based classifications * * * in hiring and discharge decisions * * *." *Id.* at 197 (citing 42 U.S.C. § 2000e-2(a)). Here, Chevron has not treated respondent differently from similarly situated persons without disabilities; persons without respondent's disability do not pose a substantial risk to their own health by performing the job in question. Moreover, in *Johnson Controls*, OSHA had concluded that "'there is no basis whatsoever'" to exclude women of child-bearing age from jobs involving lead exposure. *Id.* at 208 (quoting 43 Fed. Reg. 52592, 52966 (1978)). In this case, on the other hand, the OSH Act would permit respondent to refuse to perform the job in question because it would endanger his health. 29 C.F.R. § 1977.12(b)(2).

In short, if Chevron's decision not to hire respondent was impermissibly "paternalistic," then so is the OSH Act. Only by misconstruing this Court's precedents under a less relevant statute — Title VII — could the Ninth Circuit majority reach the result it did.[9]

Congress wished to condemn individualized judgments about whether particular workers are especially susceptible to workplace hazards.

[9] The incompatibility between the OSH Act and the Ninth Circuit's interpretation of the ADA is unavoidable, given that it cannot be seriously maintained that the ADA repeals any relevant part of the OSH Act by implication, and is a powerful reason to reject the Ninth Circuit's construction of the ADA. Petitioner's fear (Pet. 26) of state tort law stands on a slightly different footing. We agree completely with petitioner that, *unless* state law is *unambiguously* preempted by

C. Perhaps the most forceful objection to our analysis is that it arguably renders 42 U.S.C. § 12113(b) superfluous. According to that section, "qualification standards" (whose application may give rise to an affirmative defense if they are job related and consistent with business necessity) "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." Why, one might ask rhetorically, would Congress bother to say – even as an example – that "direct threat" can be a defense if the same direct threat will always be relevant at an earlier stage of the analysis, when the employee must show that he or she is a "qualified individual with a disability"?

There are many answers. One is that the showing required of the employee at the threshold may be a weaker one than the showing required ultimately to prevail over the employer's affirmative defense. Courts frequently describe the plaintiff's initial burden under employment discrimination

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the ADA, the Ninth Circuit's interpretation would cause employers to be attacked from both sides – sued under the ADA when they protect disabled workers and sued or even prosecuted under state law when they fail to do so. We further agree with petitioner that that the process of litigating preemption issues would be both burdensome and uncertain if this Court affirmed the Ninth Circuit without including in its opinion a powerful statement about the need for state law protecting disabled workers to be preempted in cases in which the ADA impels employers to ignore worker safety. The problem could be solved, however, by a powerful statement from this Court – which, unlike the Ninth Circuit's casual (and perhaps insincere) reassurance, Pet. App. 13a, would bind all lower courts – recognizing the preemptive implications of its decision. See *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 884-85 (2000) ("[O]ne can assume that Congress or an agency would not intend to permit a significant conflict" between federal regulations and state tort law liability.). Accordingly, although we strongly urge reversal of the decision below, we place less reliance than does petitioner on state law as a reason to reverse. In the unlikely event that this Court affirms the decision below, it should address preemption fully in its decision.

statute as "not onerous,"[10] and perhaps the same analysis should be applied in this case to avoid a redundancy.

The more persuasive analysis in our estimation, however, does not labor to avoid a redundancy between the "qualified individual" showing and the "direct threat" defense, but rather frankly recognizes that the ADA is a statute full of redundancies.[11] When Congress has written a statute in a way that makes it obviously fictional to engage in the ordinary presumption that it does not write redundant provisions, and when there are powerful indications that Congress intended a factor be taken into account under each of two statutory provisions, the anti-redundancy canon is not a sufficient reason to disregard those indications. See *CFTC* v. *Schor*, 467 U.S. 833, 841 (1986) (a "canon of construction does not give a court the prerogative to ignore legislative will"); *Chapman* v. *United*

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[10] *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

[11] For example, the ADA excludes from the definition of "discrimination" the application of qualification standards, tests, or selection criteria that are job related and consistent with business necessity. 42 U.S.C. § 12112(b)(6); see also 29 C.F.R. § 1630.10. But the employer may also assert, as a *defense* to a charge of discrimination, that its qualification standards, tests, or selection criteria are job related and consistent with business necessity. 42 U.S.C. § 12113(a); see also 29 C.F.R. § 1630.15(b). Similarly, it is discrimination not to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled person (42 U.S.C. § 12112(b)(5)(A)), and being qualified is of course the bedrock showing every individual must make at the threshold (*id.* § 12112(a)), but it is also an affirmative defense that the individual could not perform the job even with accommodation (*id.* § 12113(a)). Undeniably, Congress's drafting technique in *this* statute – whatever may be presumed about its drafting techniques in other statutes – was to hammer its points home by repetition rather than to avoid redundancies.

States, 500 U.S. 453, 464 (1991) (although a canon "is useful in close cases," "it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" (quoting *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989)).

Twice already this Term the Court has decided cases in which one party's best argument was that the other party's construction of a statute would render some of its provisions, or the provisions of another statute, superfluous or redundant. In *Chickasaw Nation* v. *United States*, 122 S. Ct. at 532, the Court "agree[d] with the Tribes that rejecting their argument reduce[d] [a particular statutory phrase] to surplusage" but rejected the argument anyway because it could "find no other reasonable reading of the statute." The Court further explained that "canons are not mandatory rules" but merely "guides that 'need not be conclusive.'" *Id.* at 535 (quoting *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001)). "[O]ther circumstances evidencing congressional intent can overcome their force." *Ibid.* In *J.E.M. Ag Supply Inc.* v. *Pioneer Hi-Bred International, Inc.*, 70 U.S.L.W. 4032 (U.S. Dec. 10, 2001), the petitioners argued that the Plant Variety Protection Act of 1970 would have been unnecessary if the general patent statute, 35 U.S.C. § 101, already protected sexually reproduced plants. The Court rejected that argument for a number of reasons, among them that "[t]he PVPA itself * * * contains no statement that plant variety certificates were to be the exclusive means of protecting sexually reproduced plants." 70 U.S.L.W. at 4037; see also *id.* at 4038 ("this Court has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases"). The dissent read the intent of Congress differently but was, if anything, even more emphatic in its insistence that canons merely aid the search for legislative intent. *Id.* at 4042 (Breyer, J., dissenting) ("Those who write statutes seek to solve human problems. Fidelity to their aims requires us to approach an interpretive problem not as if it were a purely logical game, like a Rubik's Cube, but an effort to divine human intent that underlies the statute."). For the various reasons we have given, nothing about the non-superfluity canon

is forceful enough to overcome the many indications – including the Rehabilitation Act regulations and the policies of the OSH Act – that Congress intended threat to self to be considered as part of the determination whether a plaintiff is a "qualified individual."

In his concurrence in *Albertsons*, Justice Thomas recognized that the same issue could be relevant to both the determination whether an individual was "qualified," and the determination whether the employer's "qualification standards" were job related and consistent with business necessity. 527 U.S. at 578-580; see also *id.* at 580 ("I would prefer to hold that respondent, as a matter of law, was not qualified to perform the job he sought within the meaning of the ADA."). The First Circuit has reached the same conclusion. See *Amego*, 110 F.3d at 143 ("[W]e discern no congressional intent to preclude the consideration of essential job functions that implicate the safety of others as part of the 'qualifications' analysis."). Such is the case here. The fact that respondent cannot perform the job he seeks without endangering his health renders him "not qualified." It also is the basis for the permissible "qualification standard" that the employee not pose a direct threat to himself or others.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.
Counsel of Record
KATHRYN S. ZECCA
Robbins, Russell, Englert Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4503

MELLANI R. HUGHES
Association of Washington Business
1414 South Cherry Street
P.O. Box 658
Olympia, WA 98507
(360) 943-1600

FRED MAIN
California Chamber of Commerce
1215 K Street, Suite 1400
Sacramento, CA 95814
(916) 444-6670

Counsel for Amici Curiae

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